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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/510,940	10/08/2004	Russell Heinrich	2776	7181
Covidien 60 Middletown Avenue North Haven, CT 06473			EXAMINER DOWE, KATHERINE MARIE	
			ART UNIT 3734	PAPER NUMBER
			MAIL DATE 03/09/2009	DELIVERY MODE PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary

Application No.

10/510,940

Applicant(s)

HEINRICH ET AL.

Examiner

KATHERINE M. DOWE

Art Unit

3734

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 06 January 2009.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-69 is/are pending in the application.
- 4a) Of the above claim(s) 12-69 is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-11 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☒ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO-893)
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date: _____
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: _____
- Paper No(s)/Mail Date 1/6/2009.

DETAILED ACTION

1. The following is a complete response to the amendment filed 1/6/2009.
2. Claims 1-69 are pending, with claims 12-69 withdrawn from consideration.

Claim Rejections - 35 USC § 102

3. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

4. Claims 1-9 and 11 are rejected under 35 U.S.C. 102(e) as being anticipated by Whitman (US 6,716,233). Whitman discloses a surgical stapler comprising an end effector (Fig 3) adapted to engage tissue and at least one micro-electromechanical system (MEMS) device (152) operatively connected to the end effector for sensing a condition. The end effector comprises a staple cartridge assembly (204) and an anvil (202), which define tissue contacting surfaces (218 and 212, respectively) with the MEMS device operatively connected to the tissue contacting surface of the cartridge (Fig 3). The MEMS device (152) is a single integral device that is operationally independent of other MEMS devices (150) configured to communicate with the surgical instrument. The device is capable of automatically adjusting based on feedback received from the MEMS device via at least one comparator for comparing a measured

parameter against at least one predetermined value (col 10, ln 51 - col 11, ln 33; Fig 4). The MEMS device may comprise a tissue proximity sensor (152) capable of measuring distance between the tissue contacting surfaces of the cartridge and anvil, and thus the thickness of the tissue clamped between the contacting surfaces (col 10, ll 21-36). The end effector may comprise a second MEMS device (150) capable of measuring the amount of pressure applied to the tissue clamped between the tissue contacting surfaces of the cartridge and anvil since decreased tissue perfusion indicates increased pressure applied (col 10, ll 9-20). The instrument is an annular stapler capable of performing an anastomosis.

Claim Rejections - 35 USC § 103

5. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.
6. Claim 10 is rejected under 35 U.S.C. 103(a) as being unpatentable over Whitman (US 6,716,233), as applied to claim 9 above, in view of Racenet et al. (US 2004/0267310). Whitman discloses the invention substantially as claimed as shown above. However, Whitman only discloses an annular stapler (Figure 3) and does not disclose a linear stapler. Racenet et al. disclose a similar surgical stapler and teach the stapler may either be linear (Figure 15) or annular (Figure 19). Therefore, it would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the device of Whitman such that the anvil and cartridge were designed as an linear stapler according to the teachings of Racenet et al. such that the device may

more readily perform an endoscopic gastrointestinal anastomosis (Racenet et al. ¶¶0050, 0103).

Response to Arguments

7. Applicant's arguments, see amendment, filed 1/6/2009, with respect to the rejection(s) of claim(s) 1-69 under Byrne et al. (US 5,395,033) have been fully considered and are persuasive. Therefore, the rejection has been withdrawn. However, upon further consideration, a new ground(s) of rejection is made in view of Whitman (US 6,716,233).

Conclusion

8. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of

the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

9. Any inquiry concerning this communication or earlier communications from the examiner should be directed to KATHERINE M. DOWE whose telephone number is (571)272-3201. The examiner can normally be reached on M-F 8:30am - 5pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Todd Manahan can be reached on (571) 272-4713. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Kevin T. Truong/
Primary Examiner, Art Unit 3734

Katherine Dowe
March 4, 2009

/K. M. D./
Examiner, Art Unit 3734

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